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80-1876

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

CORNELIUS PLANTEFABER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

(1) WHERE LAW ENFORCEMENT OFFICERS HAVE PROBABLE CAUSE TO BELIEVE THAT LUGGAGE CHECKED BY A DEPARTING AIRLINE PASSENGER CONTAINS A CONTROLLED SUBSTANCE, MUST THE OFFICERS ARREST THE PASSENGER, SEIZE HIS LUGGAGE AND OBTAIN A SEARCH WARRANT, OR, UNDER THE DOCTRINE OF EXIGENT CIRCUMSTANCES MAY THEY OPEN THE LUGGAGE TO MAKE CERTAIN THAT CONTRABAND IS PRESENT BEFORE ARRESTING THE DEPARTING PASSENGER?

(2) SHOULD THE EXCLUSIONARY RULE BE APPLIED RETROACTIVELY TO SUPPRESS EVIDENCE OBTAINED FROM A PRE-CHADWICK SEARCH OF AN AIRLINE PASSENGER'S LUGGAGE?

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TABLE OF CONTENTS

PAGE

Table of Contents 1

Index of Authorities ii

Opinions Below 2

Statement of Jurisdiction 4

Constitutional Provisions Involved . 5

Statement of Facts 6

Reasons for Granting the Writ 9-16

Conclusion 17

Appendix A 18

Appendix B 41

INDEX OF AUTHORITIES

PAGE

CASES:

Arkansas v Sanders, 442 US 753, 99 S Ct 2586, 61 LEd 2d 235 (1979) — 10,11,15,18

California v Riegler, ___ US ___, 66 LEd 2d 791 (1981) — 14

Hill v California, 401 US 797, 91 S Ct 1106, 28 LEd 2d 484 (1971) — 14

United States v Berry, 571 F2d 2 (7th Cir. 1978) cert. denied, 439 US 840, 99 S Ct 129, 58 LEd 2d 138 (1978) — 16

United States v Chadwick, 433 US 1, 97 S Ct 2476, 53 LEd 2d 538 (1977) — 10,11,12 15,16,18

United States v Colandrella, 16
605 F2d 236,
(6th Cir. 1979)

Unites States v Choate, 16
576 F2d 165
(9th Cir. 1978),
cert. denied, 439 US 953,
99 S Ct 350,
58 LEd 2d 344 (1978)

United States v Montgomery, 16
558 F2d 311
(5th Cir. 1977)

United States v Peltier, 17
422 US 531
95 S Ct 2313
45 LEd 2d 374 (1975)

United States v Reda, 16
563 US 510
(2d Cir. 1977)
cert. denied, 435 US 973,
98 S Ct 1617,
56 LEd 2d 65 (1978)

United States v Robinson, 17
414 US 218,
94 S Ct 467,
38 LEd 2d 427 (1973)

United States v Schlies 15
582 F2d 1166
(8th Cir. 1978)

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NOW COMES James J. Gregart, Prosecuting Attorney in and for the County of Kalamazoo, State of Michigan, by Michael H. Dzialowski, Principal Appellate Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on March 10, 1981.

OPINIONS BELOW

The Michigan Court of Appeals by opinion issued August 20, 1979, and published at 91 Mich App 764, 283 NW2d 846, ruled that the luggage search was justified. Arizona police officers trained in narcotics investigation observed respondent in an airport and concluded he fit a narcotics profile and the officers detected the odors of marijuana and talcum powder emanating from respondent`s suitcases which was sufficient for probable cause to search the suitcases; the Court further ruled the police were justified in conducting an immediate search because the suitcases had already been checked for passage to Michigan and both Respondent and his luggage were scheduled to depart shortly. This opinion is appended as Appendix A.

The Supreme Court of Michigan reversed the lower Court ruling by opinion issued March 10, 1981, and published at 410 Mich 594, 302 NW2d 557. The Michigan Supreme Court ruled the search was a violation of Respondent`s Fourth Amendment rights against unreasonable search and seizure. This opinion is appended as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued August 20, 1979. The Court of Appeals opinion was reversed by the Michigan Supreme Court in an opinion issued March 10, 1981. The jurisdiction of this Court is envoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

On July 26, 1973, Respondent was observed entering the Tucson, Arizona International Airport terminal and running up to a TWA ticket counter. He purchased a ticket for Kalamazoo, Michigan. He checked two suitcases and sat down. Respondent was first observed at 10:45 p.m. Respondent's flight left at 11:17 p.m. Respondent was in the airport terminal for 32 minutes.

Members of the Tucson, Arizona narcotics squad were at the airport observing passengers for possible narcotics activity. Respondent fit the profile established by the narcotics squad of those involved in narcotics traffic.

The police officers went into the baggage area and could smell marijuana and talcum powder from the outside of

Respondent's suitcases. The suitcases were seized. One of the suitcases was opened and 14 bricks of marijuana were found. The suitcases were placed on the conveyor belt for the plane which the officers knew was leaving within the next few minutes.

The police authorities in Kalamazoo, Michigan were notified by the Arizona police of what had transpired. Kalamazoo officers observed Respondent arrive, pick up his baggage and take it to a taxicab. The officers did not arrest Respondent at this time due to the arrival of a school bus loaded with young children. The officers ordered the taxi stopped as it left the airport. Respondent was placed under arrest. One of the suitcases was opened at the point of the stop. At no time was a search warrant ever obtained.

The Michigan Court of Appeals ruled that there was an adequate showing of exigency to support the need for an immediate warrantless search. The test applied was that of the reasonableness of the search in Arizona, relying on Cooper v California, 386 US 58, 87 S Ct 788, 17 LEd 2d 730 (1967) rather than on United States v Chadwick, 433 US 1, 97 S Ct 2476, 53 LEd 2d 538 (1977). The Court in footnote 4 determined it need not discuss the retroactive applicability of Chadwick.

The Michigan Supreme Court ruled that there were no exigent circumstances authorizing a warrantless search of Respondent's luggage. The Michigan Supreme Court relied entirely upon this Court's decisions of United States v Chadwick, supra, and Arkansas v Sanders, 442 US 753, 99 S Ct 2686, 61 LEd 2d 235 (1979) in reaching its decision.

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court held that the Arizona Police lacked exigent circumstances and, therefore, acted improperly in searching Respondent's luggage. The Michigan Court ruled "once they had it in their custody and control by removing it from the conveyor . . . the claimed exigency of mobility had passed upon their seizure of the luggage." The Michigan Court relied almost entirely upon this Court's holdings in United States v Chadwick, 433 US 1, 97 S Ct 2476, 53 LEd 2d 538 (1977) and Arkansas v Sanders, 442 US 753, 99 S Ct 2586, 61 LEd 2d 235 (1979). Petitioner submits that the Michigan Supreme Court has misapplied Chadwick and Sanders, and, thereby, the Fourth Amendment.

In both Chadwick and Sanders exigent circumstances were absent because the

defendants were under arrest. This was not true in the present case. The Arizona police could have simply seized the luggage and perhaps stopped the airplane and arrested the Respondent. This should not have been their only choice of action.

This Court did not set up a higher degree of privacy expectation with regard to luggage in Chadwick. Rather, this Court noted that luggage does not share the diminished expectation of privacy which surrounds the automobile. Petitioner does not contend that there is a lesser requirement for a warrant to seize the contents of luggage than there is for the seizure of other items. The question in the present case does not involve the expectation of privacy. Rather, it involves exigent circumstances due to the intended mobility of luggage in common carrier airline travel. While

Chadwick prohibits a reduction of warrant requirements merely because the item is luggage, it does not prohibit seizure where exigent circumstances are involved. In fact, this Court indicates that given exigent circumstances the seizure of the footlocker in Chadwick, would have been justified, United States v Chadwick, supra, 54 LEd 2d 538, at 548.

Petitioner relies upon the existence of actual exigent circumstances which takes this case outside the Chadwick-Sanders rationale. The Arizona police were working under a time constraint. There was only a thirty-two minute time frame within which to work and make the correct on the spot legal decision. The probable cause to search the luggage did not arise until after Respondent had checked his luggage and boarded the airplane. A hurried arrest in these circumstances

certainly qualifies as exigent circumstances. The police could have attempted a hurried arrest, however, this is a dangerous situation. There is the danger to the public inherent in a hastily contrived arrest aboard an airplane or in an airport terminal. It is merely conjecture whether an arrest could have been made and made without danger to the public. The Arizona police acted reasonably in seizing and searching Respondent`s luggage under these exigent circumstances.

The alternatives facing the police were to get a search warrant and be left without the perpetrator of the offense or to make a mandatory arrest. The police officer in the heat of an investigation under the time constraints present in the instant case should be required to only act reasonably not with legal certainty.

Faced with the situation as described it was reasonable to be certain of the contents of the luggage. Probable cause does not mean absolute certainty. See Hill v California, 401 US 797, 91 S Ct 1106, 28 LEd 2d 484 (1971). The opening of the suitcases in Arizona was therefore, proper, rendering its seizure and opening in Michigan also proper. CF. California v Riegler, ___ U.S. ___, 66 LEd 2d 791 (1981) (Rehnquist, J., in Chambers)

Throughout the entire case Petitioner has maintained and argued that Chadwick, supra, and Sanders, supra, was not raised directly. However, the Michigan Court of Appeals in footnote 4 of its opinion did indicate that since their analysis disposed of the Michigan search issue, the Court would not consider the retroactive application of Chadwick, 283 NW2d 846, 850.

There is currently a split among the United States Circuit Courts of Appeal as to whether or not Chadwick, supra, will be applied retroactively to pre-Chadwick cases. There is only the Eighth Circuit which has given Chadwick retroactive application in United States v Schleis, 582 F2d 1166 (8th Cir. 1978). The Second, Fifth, Sixth, Seventh and Ninth Circuits have all ruled that Chadwick decided June 21, 1977, is not retroactive to searches conducted prior to that date. United States v Reda, 563 F2d 510 (2d Cir. 1977) cert. denied, 435 U.S. 973, 98 S. Ct. 1617, 56 L.Ed.2d 65 (1978); United States v Montgomery, 558 F.2d 311 (5th Cir. 1977); United States v Calandrella, 605 F.2d 236 (6th Cir. 1979); United States v Berry, 571 F.2d 2 (7th Cir. 1978), cert. denied, 439 U.S. 840, 99 S. Ct. 129, 58 L.Ed. 2d 138 (1978); United States v Choate, 576 F2d 165 (9th Cir. 1978), cert.

denied, 439 U.S. 953, 99 S Ct 350, 58 L.Ed. 2d 344 (1978).

If this Court agrees that Chadwick, supra, applies to the instant case then it cannot be applied retroactively to this search which occurred on July 26, 1973. This Court in United States v Peltier, 422 U.S. 531; 95 S. Ct. 2313, 45 L.Ed. 2d 374 (1975) addressed the problem of retroactive application of the exclusionary rule in a Fourth Amendment setting. This Court applied two rationales for the exclusionary rule, the imperative of judicial integrity and the deterrance of illegal police conduct. This Court ruled that neither of these goals would be served by excluding evidence which police officers believed in good faith was admissible at trial.

In 1973 there was no reason for police officers to believe suitcases were not

included with personal effects which could be searched incidental to a lawful arrest. United States v Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L.Ed. 2d 427 (1973). The Michigan officers were acting reasonably in light of the then existing law. The Arizona officers were also acting reasonably in light of the exigent circumstances which they faced.

Petitioner submits that the Michigan Supreme Court misapplication of Chadwick and Sanders as well as the retroactive effect given them warrants plenary review by this Court.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan Supreme Court is in conflict with and misconceives decisions of this Court, and is in conflict with the Fourth Amendment of the United States Constitution such that plenary review should be granted by the Court, and Petitioner's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: May 5, 1981/slk

APPENDIX A

COURT OF APPEALS OPINION

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

August 20, 1979

Plaintiff-Appellee,

v No. 78-2022

CORNELIUS PLANTEFABER,

Defendant-Appellant.

BEFORE: WALSH, P. J., and KELLY and OPPLIGER,* JJ.

WALSH, Presiding Judge.

Defendant was convicted in a bench trial of possession of marijuana with intent to deliver, M.C.L. 335.341(1)(c); M.S.A. 18.1070(41)(1)(c). He was sentenced to a three-year term of probation and was ordered to pay court costs in the amount of $500.

On July 26, 1973, police officers of the Metropolitan Narcotics Squad in Tucson, Arizona, were conducting a general surveillance at the Tucson, International Airport. They were observing persons and baggage at the airport for possible narcotics activity. At 10:45 p.m. defendant was seen entering the airport terminal and running up to the TWA ticket counter after being told that an American Airlines flight he wanted was full. He bought a ticket for a flight to Kalamazoo, Michigan. The flight was scheduled to leave a 11:17 p.m. Defendant checked two suitcases with the airline agent. According to two officers who saw defendant, he fit the "profile" used by narcotics investigators in detection of persons possibly involved in narcotics activity. For example, defendant had arrived at the airport shortly before his departure, he was very nervous and did not

let go of his bags until they were checked with the airline. Defendant's age, dress and the apparent heaviness of his bags were also considered material factors. Two other officers were stationed in the lower level baggage area, to which a conveyor belt conveyed luggage which had been checked with the airline. They were in the process of smelling all of the bags and were told to pay particular attention to those of defendant. One of the officers testified that he smelled defendant's suitcases and detected the odors of marijuana and talcum powder, which is commonly used to mask the odor of marijuana. Talcum powder was seen on the outside of one of the suitcases. One suitcase was opened and found to contain 14 bricks of marijuana. One brick was removed and retained by the officers. Another was removed, marked and returned to the suitcase. The suitcase was then

closed and sealed. An edge of the other case was pried open; marijuana bricks were seen inside the case. Because of the plane's departure, there wasn't time to open this suitcase. The cases were each replaced on the conveyor belt for loading onto the plane.

Lt. Michael Moshier of the Kalamazoo Police Department received a phone call from one of the Arizona officers in the early morning hours of July 27. The Arizona officers gave him a description of defendant and his suitcases and information concerning defendant's arrival. This information was forwarded to Officer Wayne Loney, who went to the Kalamazoo airport and saw defendant disembark from the plane. He watched defendant claim the two suitcases which matched the description relayed to him by Lt. Moshier. Defendant took the bags to a

taxicab. As the taxicab drove away from the airport, it was stopped by the police. Defendant was arrested and the suitcases were removed from the taxicab. One of the cases was opened at that time. The other suitcase was opened at the jail to which defendant was taken.

Defendant unsuccessfully moved for suppression of the evidence relating to the contents of his suitcases, claiming that he had been the victim of two unconstitutional searches and seizures. With respect to the police activity in Arizona, the trial court found that defendant had matched the narcotics profile, that experienced officers had detected the odor of marijuana in defendant's suitcases, and that there had not been time for the Arizona officers to obtain a search warrant before the departure of defendant's plane. That

court ruled that the existence of probable cause and exigent circumstances had made the warrantless Arizona search and seizure reasonable. We agree.

[1] In determining if the Arizona officers had probable cause to search the suitcases, we must examine the facts, circumstances and the information known to them at the time of the search. People v Rodriguez, 83 Mich App 609, 269 NW2d 199 (1978).

The Arizona officers had observed defendant and had concluded that he matched a narcotics "profile". The officers were specially trained in narcotics investigation and were experienced in detection of marijuana. They detected the odors of marijuana and talcum powder emanating from the suitcases. As observed by Justice Williams in People v Hilber, 403 Mich 312,

333, 269 NW2d 159 (1978) (dissenting opinion of Williams, J.), the United States Supreme Court has recognized "the evidentiary quality of odor". See Johnson v United States, 333 U.S. 10, 68 S Ct 367, 92 L Ed 436 (1948).

With respect to probable cause, the United States Supreme Court's decision in United States v Chadwick, 433 U.S. 1, 97 S Ct 2476, 53 L Ed 2d 538 (1977), supports the trial court's ruling. In that case the Supreme Court affirmed suppression of evidence because of the absence of the requisite exigency for a warrantless search and seizure. The Court, however, did not disturb the holding of the First Circuit Court of Appeals that there had been probable cause to search the defendants' footlocker. Railroad officials in San Diego had noticed that the footlocker, which they saw being

loaded onto a train bound for Boston, was unusually heavy and that it was leaking talcum powder. Because one of the defendants matched a profile used to spot drug traffickers, the officials notified Federal agents in San Diego, who relayed the information to Federal narcotics agents in Boston. When the train arrived in Boston, the footlocker ws claimed by the defendants. The Federal agents released a police dog trained to detect marijuana near the footlocker. Without alerting the defendants, the dog signaled the presence of a controlled substance inside the footlocker. We agree with the First Circuit that there was probable cause to search the footlocker. We also see no significant distinction regarding probable cause, between that case and the case at hand.

[2] Defendant's reliance on People v Hilber, supra, is misplaced. In that case, although some of the Justices acknowledged distinctions between the separate odors of unburned, burning and burned marijuana insofar as those odors might constitute probable cause for a search, there was no disagreement that the odor of unburned marijuana was indicative of the actual presence of marijuana.[1]

[3] Although we agree with the trial court's determination that there was probable cause to search defendant's suitcases in Arizona, our inquiry must go further to a determination of whether there was an adequate showing of some exigency to support the need for an immediate warrantless search. United States v Chadwick, supra, 433 US 15, 97 S Ct 2476. We are guided by the standard of reasonableness, the cornerstone in Fourth

Amendment analysis. United States v Chadwick, supra, 9, 97 S Ct 2476. The test is not whether the police could have secured a search warrant but whether the search was reasonable. Cooper v California, 386 U.S. 58, 62, 87 S Ct 788, 17 L Ed 2d 730 (1967).

Our review of the record convinces us that the Arizona officers were justified in conducting an immediate search of defendant's suitcases. The circumstances at the time of the search were sufficiently exigent to make this course of action entirely reasonable. The suitcases had already been checked for passage to Kalamazoo. Both defendant and his luggage were scheduled to depart shortly. Only 32 minutes passed between the time defendant was seen entering the airport and the scheduled departure time of the plane.

This case is similar to the Maryland case of Waugh v State, 20 Md App 682, 318 A2d 204 (1974), rev'd on other grounds 275 Md 22, 238 A2d 268 (1975),[2] where the Maryland Court of Special Appeals noted that it would have been impractical for the Arizona police to obtain a warrant for search of the defendant's suitcases which were to leave shortly for Maryland. The Maryland Court also rejected the notion that the police who opened the defendant's suitcases in Arizona should have requested the airline to hold the luggage or should have relied on the police at the end of the flight to obtain search warrants.[3] See also United States v Ford, 525 F2d 1308, 1313 (CA 10, 1975). We conclude that the trial court's refusal to suppress evidence of the Arizona search was correct.

Defendant's next challenge is to the admissibility of evidence obtained as a result of the opening of his suitcases by the police in Michigan. It is not disputed that no warrant had been obtained by the Michigan authorities and that defendant did not consent to any search of his suitcases by the Kalamazoo police.

[4] If we were to view the Michigan warrantless searches in isolation from the totality of circumstances, we would be perhaps constrained to find them constitutionally firm on the basis of United States v Chadwick, supra.[4] However, we decline to accept defendant's apparent contention that the opening of his suitcases in Michigan must be viewed as separate and distinct from what occurred in Arizona.

In United States v DeBerry, 487 F2d 448 (CA 2, 1973), the defendant's challenged

the seizure in New York of a suitcase containing marijuana first discovered in a California search. The Second Circuit panel first found no infringement of Fourth Amendment rights in the inspection of the luggage by a Los Angeles air freight supervisor. The supervisor found 15 bricks of marijuana in the suitcase. He notified the Los Angeles police, who inspected the bag and relayed the information to New York authorities. The bag was placed under surveillance upon its arrival in New York. It was eventually seized when the defendants, who had picked it up at the New York airport, were arrested. Noting the 15-hour prearrival notice given by the Los Angeles police, the Court rejected the government's contention that it would have been "unduly burdensome" for the New York authorities to obtain a search warrant. Id, 450-451, fn. 3. Nevertheless, the Court ruled that

the New York authorities need not have obtained a search warrant.

> It may be argued that the New York seizure was separate and distinct from the California search, and because there was ample opportunity for the New York officers to obtain a warrant for the suitcase's seizure, its warrantless seizure violated the fourth amendment. See Coolidge v New Hampshire, 403 US 443, 470-471, 91 S Ct 2022, 29 L Ed 2d 564 (1971). This, however, would ignore the facts and realities of the situation. The suitcase was seized initially in California by Sergeant Figelsky of the Los Angeles Police Department. That seizure although done without warrant was legal, because Emery's legal inspection in effect put the marijuana in Figelsky's plain view; he, therefore, could seize the contraband upon sight. Cf. United States v Riggs, 474 F 2d 699 (2d Cir. 1973), cert. denied, 414 U.S. 820, 94 S Ct 115, 38 L Ed 2d 53 (1973). Figelsky made the seizure by removing one of the bricks of marijuana, marking all of the rest of the bricks with his initials, and finally marking the suitcase itself with his initials. He then authorized the suitcase to be shipped on. Even though the suitcase was then in transit, later in the luggage bin, and later still in the freight room, it remained legally "seized" just

> as much as if it were under the actual physical control of the police. In fact, except for the time that it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car appellants were in, they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait. Accordingly, no warrant was required. Id., 450-451. (Footnotes omitted, emphasis added.)

In accord is United States v Ford, supra, where the Court rejected the defendant's assertion that an Oklahoma seizure was separate and distinct from a California search and further rejected the argument that, since there was time to obtain a warrant before the Oklahoma seizure, the failure to do so violated the Fourth Amendment. Finding that the defendant's "analysis misapprehend[ed] the facts and realities of the situation", the Court stated:

> Realistically, the contraband was seized by the officers in California before it was ever shipped to Oklahoma. See United States v DeBerry, 487 F2d 448 (2d Cir. 1973). The California officers marked the package and placed a business card inside it. Upon receiving assurances of cooperation from Oklahoma City officers, they authorized its shipment. This action constituted the initial act of control and dominion over the contraband, for without government authorization the airline officials could not have shipped the contraband. This official dominion continued unbroken because close surveillance followed the seized contraband, insuring that it remain within official possession. Actual physical control was in fact reasserted by the Oklahoma City police when the arrest process was completed. These material facts are indistinguishable from DeBerry, supra, and we adopt the analysis of that case in concluding that the official seizure of the contraband occurred in San Francisco when the government asserted dominion over it. The seizure must be adjudged against the Fourth Amendment as of that time and place. 525 F2d 1308, 1312-1313.

Also see Waugh v State, supra, 20 Md App 682, 708-709, 318 A2d 204, and State v

Pohle, 160 N.J.Super. 576, 583, 390 A2d 692 (1978).

We conclude that the reopening of defendant's suitcases in Michigan was not a prohibited "search". The police, in effect, exercised continuous control over the suitcases from the time of the Arizona search until defendant's arrest in Michigan. As discussed, supra, there was no constitutional violation in the Arizona search.

[5] Defendant also argues on appeal that the trial court erred in denying his motion to dismiss on the grounds that the prosecution failed to endorse and produce one of the Arizona officers. Only three of the four Arizona officers were produced at trial. After hearing the parties' arguments, the trial court ruled that the missing officer was not a res gestae

witness and that, even if he were, his testimony would be merely cumulative.

We disagree with the trial court's determination that the missing Arizona officer was not a res gestae witness. People v Abdo, 81 Mich App 635, 643, 265 NW2d 779 (1978). Defendant is entitled to a determination of whether nonproduction adversely affected his right to a fair trial. People v Pearson, 404 Mich 698, 273 NW2d 856 (1979).

Review of the record, however, reveals that such a determination has already been made and that no reversible error occurred. Compare People v Porter, 406 Mich 890, (1979). The record fully supports the trial court's conclusion that the witness's testimony would have been merely cumulative.

We have considered the remaining issue raised by defendant on appeal and find no reversible error with respect to that issue.

Affirmed.

APPENDIX A FOOTNOTES

[1]. Defendant also cites cases involving the admissibility of tracking dogs evidence. Attacking the reliability of the Arizona officers' testimony concerning their detection of marijuana, he argues that "a human whose degree of smell is presumably inferior compared to a dog should not be allowed to validate his own experience by his own self-serving statements". We find unpersuasive defendant's analogy to tracking dog evidence. Such evidence is admissible only if it satisfies certain foundational requirements. People v Norwood, 70 Mich App 53, 245 NW2d 170 (1976), lv. den. 397 Mich 884 (1976); People v Harper, 43 Mich App 500, 204 NW2d 263 (1972), lv. den. 389 Mich 759 (1973). Tracking dog evidence standing alone, however, is insufficient to support a conviction. People v McPherson, 85 Mich App 341; 271 NW2d 228 (1978); People v Perryman, 89 Mich App 516, 280 NW2d 579 (1979). In McPherson, the Court examined the arguments against admission of tracking dog evidence and found therein several reasons for the necessity of corroborating evidence. Among the principal objections to the use of tracking dog evidence are the defendant's inability to cross-examine the dog and the deprivation of the defendant's right to confront his accusers. Also significant is the court's inability to determine why the dogs act as they do. 85 Mich App 345-346, 271 NW2d 228, citing 18 A.L.R.3d 1221, 1223-1224. These objections are not relevant to the testimony of humans who are available for cross-examination. McPherson, implicitly recognizes that the corroborating evidence rule would not apply if tracking dogs were

capable of understandingly taking an oath, describing their credentials and experience, and detailing the stages of their investigations. We are not persuaded that the sense of smell of humans cannot be used to establish probable cause or that the "self-serving" testimony of the person doing the smelling is inherently unreliable.

2. In reversing the earlier decision in Waugh, the Maryland Court of Appeals found that the Arizona search was invalid because based on insufficiently verified informant information and that the Arizona officer had not smelled marijuana in the defendant's suitcases but had only smelled talcum powder, in itself not an unusual item in a suitcase. The Arizona officers had not had even reasonable ground to search the suitcases.

3. The Waugh court's analysis was based on its holding that a warrantless search of a suitcase is constitutionally permissible whenever there is probable cause to believe it contains contraband or other evidence of crime and there are exigent circumstances requiring immediate search. 20 MD App 682, 699; 318 A2d 204. Our analysis is like that of the Maryland court. In our view, United States v Chadwick, supra, confirmed the validity of this analysis. Although the Supreme Court declined to treat luggage in the same manner that automobiles are treated for Fourth Amendment purposes, the Court repeatedly emphasized that, if some exigency exists, warrantless searches of luggage may be permissible. United States v Johnson, 588 F2d 147 (CA 5, 1979), is, we think, in accord with this interpretation of Chadwick.

The United States Supreme Court has recently reaffirmed its Chadwick decision. In Arkansas v Sanders, ___ U.S. ___, 99 S Ct 2586, 61 L Ed 2d 235 (1979), the Supreme Court declined to extend the warrant requirement's "automobile exception" to all searches of luggage taken from automobiles stopped on the highway. The Court specifically recognized, however, that, "[t]here may be cases in which the special exigencies of the situation would justify the warrantless search of a suitcase." Id., ___, fn. 11, 99 S Ct 2593. The state conceded in Sanders that no special exigencies had existed. Moreover, the Court noted the possibly significant circumstances of luggage about to be loaded into an airplane; the public safety may require warrantless searches of such luggage. Id., ___, fn. 12, 99 S Ct 2586.

Although "public safety" concerns were not necessarily involved in the instant case, we nonetheless are of the opinion that the requisite special exigencies have been established.

[4]. Because of our disposition of the Michigan "search" issue, we need not discuss the retroactive applicability of Chadwick. Nor need we determine if, when viewed in isolation, the Michigan activity amounted to a Chadwick search. See, e.g. People v De Santis, 46 NY2d 82, 412 NYS 2d 838, 385 NW2d 577 (1978). And finally, discussion of the relevance of the "automobile exception" in

luggage cases is unnecessary to our disposition.

APPENDIX B

COURT OF APPEALS OPINION

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

March 10, 1981

Plaintiff-Appellee,

v No. 63745

CORNELIUS PLANTEFABER,

Defendant-Appellant.

KAVANAGH, Justice.

This case involves the constitutionality of a warrantless search of personal luggage. Minimum constitutional guarantees provide that a search of personal effects must be attended by probable cause [1] and either a warrant or exigent circumstances. [2] The

absence of a warrant in this case reduces the focus of our constitutional assessment to the existence vel non of probable cause and exigent circumstances. Conceding, arguendo, the exigent circumstances authorizing the warrantless seizure of the luggage, there were no exigent circumstances authorizing its warrantless search.

On July 26, 1973, narcotics officers of the Tucson, Arizona Police Department were conducting general surveillance at the Tucson International Airport. Their surveillance consisted of observing people and luggage for possible narcotics activity. At 10:45 p.m. two officers observed defendant as he entered the terminal. The officers testified that defendant appeared nervous and that his general demeanor fit a "profile" which the officers had come to associate with people

who traffic in drugs. Other police officers in a private TWA baggage room smelling all the luggage which passed by on a conveyor were told to pay special attention to defendant`s luggage. Two police officers placed their noses along the seams of defendant`s two suitcases as they passed by along the TWA baggage conveyor. Concluding that they smelled marijuana and talcum powder, the officer removed both suitcases from the conveyor.

With the use of tools the officers broke the lock on one suitcase and searched its contents, discovering 14 bricks of marijuana. Two bricks were removed and marked, one being kept by the police officers in Arizona and never offered in evidence and the other replaced in the suitcase. The other suitcase was pried open at a corner revealing its contents of marijuana. The officers did

not retain custody of the suitcases but closed, sealed and placed them back on the TWA conveyor for loading into the departing plane. One officer returned to the main concourse to confirm defendant's destination as Kalamazoo, Michigan.

The Tucson narcotics officers chose not to arrest defendant but rather to relay all of their information to the Kalamazoo police department. Defendant was observed at the Kalamazoo airport as he disembarked from a plane approximately six hours later. Kalamazoo police officers observed defendant as he collected his luggage and made his way out of the terminal and into a taxicab. The officers testified that they did not arrest defendant as he approaced the taxi because a bus full of children was arriving. The officers waited until the cab left the airport and stopped it as it drove on a nearby road.

The defendant was arrested, and his luggage taken out of the taxi and searched immediately to reveal marijuana.

Neither the Tucson police officers nor the Kalamazoo police officers had obtained or even attempted to obtain a search warrant.

On appeal defendant-appellant contends that the trial court erred in not suppressing the marijuana as a product of an invalid search and seizure. Neither search was carried out pursuant to a warrant and defendant argues that once the police seized his luggage, whether in Arizona or in Michigan, they should have retained custody thereof until a warrant was obtained.

The prosecution contends that the trial court was correct in refusing to suppress the marijuana. Appellee argue that there

was only one search involved. What occurred in Kalamazoo was not a separate search and seizure, it argues, but only a reassertion of control which had been obtained in Arizona. The initial intrusion in Arizona is argued as justified by probable cause and exigent circumstances. The similarity between the defendant`s demeanor and the drug profile along with the odor of unburned marijuana and the presence of talcum powder are argued as providing probable cause to believe defendant`s luggage contained contraband. The impending departure of defendant`s flight to Kalamazoo is argued as an exigent circumstance. The prosecutor further contends that because the Tucson police relayed their information to the Kalamazoo police the authorities never relinquished custody of defendant`s luggage and thus what occurred in Kalamazoo was not a separate search but

merely a continuation of the valid search which began in Arizona.

This argument misses the point.

Whether there was but one seizure or not and whether it was in Arizona or Michigan, the question before us is the propriety of the search of the luggage after its seizure.

The Arizona police could not have searched the luggage once they had it in their custody and control by removing it from the conveyor, because the claimed exigency of mobility had passed upon their seizure of the luggage. United States v Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). If it is conceded, arguendo, that their custody continued and invested the Michigan police with authority to maintain that custody, when the Michigan police removed the suitcases

from the taxi there was no exigency of mobility or otherwise authorizing a warrantless search in Michigan.

In Arkansas v Sanders, 442 U.S. 753, 763, 99 S.Ct. 2586, 2593, 61 L.Ed.2d 235 (1979), the Court observed:

> But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search--after the police have seized the object to be searched and have it securely within their control. See 433 U.S. at 13 [97 S.Ct., at 2484]. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. (Footnote omitted; emphasis added.)

The philosophy behind this holding is set forth in Chadwick where the Court explained its prior holding in Chambers v Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970):

> Respondent's principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but

> in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondent's use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.
>
> It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in Chambers, unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage. 433 U.S. 1, 13-14 fn. 8, 97 S.Ct. 2476, 2484-2485, fn. 8.

When the police have custody and control over personal luggage a warrantless search cannot be justified on the basis of the exigent circumstance of mobility.

The evidence here should have been suppressed.

Our holding on this point obviates the need for discussion of the other issues regarding asserted failure to produce a res gestae witness.

Reversed.

FITZGERALD, Deputy C.J., and RYAN, MOODY and LEVIN, JJ., concur.

WILLIAMS, Justice, concurring.

I concur because the Kalamazoo police had sufficient notice to get a warrant.

COLEMAN, Chief Justice (dissenting).

Defendant was convicted of possession of marijuana with intent to deliver.[1] The Court of Appeals affirmed his conviction. This Court granted leave to appeal[2] and the majority concludes that defendant's conviction must be reversed because of what is deemed an unconstitutional search

of defendant's luggage in Kalamazoo, Michigan. I dissent from this holding, having concluded that the marijuana introduced into evidence was not obtained in violation of defendant's constitutional rights. The search and seizure in Tucson, Arizona was constitutional and the luggage remained in continuing control of the police through the time of arrest in Kalamazoo.

I

The entire Arizona episode took place within 32 minutes.

On July 26, 1973, officers of the Tucson, Arizona, narcotics squad were at the Tucson airport observing passengers for possible narcotics activity. Tucson apparently is a busy crossroad for drug traffic, and surveillance was routine. At 10:45 p.m., two officers observed

defendant as he entered the terminal. They saw defendant hurry to the line at the American Airlines counter carrying two heavy suitcases. When defendant learned the flight he wanted was full, he ran to the TWA counter. He had held his luggage in his hands during this period. He purchased a ticket for a flight via TWA to Kalamazoo leaving at 11:17 p.m. and checked his luggage. Then defendant sat down in a chair next to Officer Fragoso, who was in plainclothes. After a short exchange, defendant walked around the terminal, constantly looking about him, until he boarded his flight.

The experienced narcotics officer concluded that defendant fit the established "profile" of persons possibly involved in narcotics trafficking:[3] The defendant had arrived at the airport hurriedly, just before a flight and

without a ticket. At a second counter he purchased a ticket for an imminent flight. His luggage had appeared to be heavier than usual, causing him to hunch his shoulders but he did not rest it on the floor. He appeared nervous, repeatedly looked over his shoulder and around the room, and could or would not sit still. He talked rapidly when he conversed with the officer. Manner of dress and appearnce were mentioned but did not receive much, if any, weight.

Because defendant appeared to fit the profile established by experience, Officer Fragoso told other officers who were in the baggage claim area to pay particular attention to defendant's luggage when it arrived on the conveyor belt. Serveral officers then detected an odor of marijuana emitting from the luggage and observed talcum powder on the outside of

one suitcase. Talcum powder is widely used to mask the odor of marijuana. Because they had probable cause to believe that contraband was contained in the suitcases, the officers seized defendant's luggage, removing it from the conveyor belt.

The officers then opened one of defendant's suitcases. Inside they found 14 bricks of marijuana. The officers removed two bricks from the suitcase and marked them for identification. They kept one for evidentiary purposes and replaced the other. Then they repacked and eventually closed the suitcase.

They did not have sufficient time to open and inventory the other suitcase because defendant's flight was scheduled to leave. Instead, they pried open one edge, observed more bricks of marijuana and shut the suitcase. In each suitcase

they placed a scrap from a page of a notebook with initials of two officers and the time and date. They replaced the suitcases on the conveyor and the luggage was loaded on the airplane. All of this took place in 32 minutes from defendant's entry into the airport until the plane's departure. The search and seizure took considerably less time.

The defendant made the flight without arrest but Officer Fragoso telephoned the Kalamazoo Police Department to notify them of the information they had obtained. Lieutenant Michael Moshier received the telephone call informing him of descriptive details of defendant and his luggage and results of the Arizona search and seizure.

When defendant disembarked from the airplane in Kalamazoo, an officer placed him under observation. The officer

allowed defendant to pick up the two suitcases and carry them out to a taxicab. Because of a busload of children in that area, no arrest was made there. Defendant left the airport in the cab with the police following. The officers stopped the taxicab as soon as they could without creating unnecessary danger to others. They arrested defendant and removed the suitcases from the trunk. They then opened one of the suitcases, exposing the marijuana.

Defendant was convicted in a bench trial of possession of marijuana with intent to deliver. He was sentenced to three years' probation and ordered to pay court costs of $500.

II

The main issue on appeal is the constitutionality of the officers' actions

in Tucson and Kalamazoo, in searching and seizing defendant's suitcases.

U.S. Const., Am. IV, provides two significant protections for the security and privacy of persons. It protects against "unreasonable searches and seizures". Also, the amendment has been construed to require that most searches of private property be performed pursuant to a search warrant.[4] The warrant provision, requiring review by a neutral and detached magistrate,is the primary protection against the risk of unreasonable assertions of executive authority.[5]

Nevertheless, there are serveral well-recognized exceptions to the warrant requirement. In cases in which the societal cost of obtaining a warrant, such as dangers to law-enforcement officers or others or the risk of loss or destruction of evidence, outweighs the reasons for

requiring a warrant, a warrant may not be required, see United States v United States District Court, 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed.2d 752 (1972).

One exception to the warrant requirement is when exigent circumstances do not permit sufficient time to obtain a warrant, see Schmerber v California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).[6] The majority concludes that the circumstances surrounding the search of the luggage in Arizona did not remove the necessity of securing a warrant. I disagree, concluding that the fact that defendant was not in the officers' custody and was in the process of boarding an airplane to leave the jurisdiction constituted exigent circumstances relieving the officers from complying with the warrant requirement. By the time a

warrant could have been obtained defendant would have been long gone. He was not under arrest and his plane was about to depart. It is not "reasonable" to seize the proof of criminality but suffer the criminals to escape. In order to make sense, "exigent circumstances" must encompass mobility of the trafficker as well as the contraband in traffic.

It appears to me that the word "unreasonalbe" is sometimes overlooked in consideration of the prohibition against "unreasonable searches and seizures".

III

The defendant's appearance, activities and behavior upon entering the terminal in Tucson provided a reasonable basis for the officers to pay special attention to defendant's luggage. However, this decision did not constitute a seizure

subject to constitutional scrutiny. The officers, then being in a position in which they had a right to be, detected the odor of marijuana emanating from the suitcases and observed talcum powder on the outside of one suitcase. These perceptions were the equivalent of plain-view observations.

Considering the officers' experiences with hundreds of similar cases and all the circumstances surrounding these observations, I am persuaded that the officers had probable cause to believe that contraband was contained in the luggage. Also, because the luggage was scheduled to be removed from the jurisdiction unless immediate action was taken, the officers were justified in seizing the luggage. I think the majority would not conclude otherwise. Our area of

disagreement is over the propriety of the officers' actions after they seized the luggage.

IV

Defendant relies heavily upon United States v Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). I agree with the Court of Appeals that the case supports the trial judge's ruling. Chadwick concerns a defendant, lawfully arrested, who was brought with his footlocker to the Federal Building. There, the officers searched the footlocker without a warrant. The Court held that, because defendant was under arrest and in custody, no exigent circumstances were present to excuse a warrantless search.

Such is not the case before the Court. The suitcases were already checked for

passage to Kalamazoo (with one stopover) and the plane about to depart with defendant on it. There was no time to seek a search warrant. The existence of probable cause and the exigent circumstance of defendant's imminent departure from Arizona rendered the warrantless search and seizure "reasonable".

Arkansas v Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), concerns a similar situation, but with some different facts. A reliable informant who previously had given the Little Rock Police Department information leading to defendant's arrest and conviction for possession of marijuana, again informed the department of the time and place of defendant's arrival by airplane and the fact that defendant was traveling with a green suitcase of a given

description which contained marijuana. Defendant arrived as stated, selected from the baggage area a green suitcase matching the description given, and left with a third party. They placed the suitcase in a taxi which defendant had waiting. The officers stopped the taxi. Upon request, the taxi driver opened the trunk, and, without further permission, the officers opened the suitcase. Ten plastic bags containing 9.3 pounds of marijuana were found. Defendant was convicted of possession of marijuana with intent to deliver. The Arkansas Supreme Court found that the officers had probable cause to believe that the suitcase contained marijuana but that there were no exigent cirumstances since both defendant and suitcase were under their control and could have been secured while a warrant was obtained.

Although Sanders might have application to the Kalamazoo search under other circumstances, the luggage in question already had been properly seized and searched in Arizona. It was clearly identified as such by the officers' actions and insertions into each suitcase. The luggage continued under control of the Arizona police. The Kalamazoo police properly arrested defendant. Their looking into one suitcase after a prior search, seizure and arrest--probably to ascertain that the marijuana still was there--does not serve to vacate or taint the initial search. It had no bearing upon any right of which defendant was then possessed. There is no prohibition against looking any number of times into a suitcase legally searched and seized.

The Kalamazoo officers knew the luggage contained contraband because the officers

in Arizona had viewed the contraband and permitted the defendant to receive it in Kalamazoo as a controlled delivery. Controlled deliveries of contraband may serve useful in law enforcement. When such a delivery is made, through a constitutionally valid search followed by delivery, the subsequent search of the container following deliver, to insure the contraband has not been removed, is not subject to a constitutional objection on the basis that the search was made without a warrant, see United States v Andrews, 618 F.2d 646 (CA 10, 1980), cert. den., ___ U.S. ___; 101 S.Ct. 84, 66 L.Ed.2d 26 (1980); United States v Bulgier, 618 F.2d 472 (CA 7, 1980); United States v Ford, 525 F.2d 1308 (CA 10, 1975); Untied States v DeBerry, 487 F.2d 448 (CA 2, 1973).

In DeBerry, the facts were similar to those before us. A Los Angeles air

freight supervisor found 15 bricks of marijuana in a suitcase. Los Angeles police inspected the bag and relayed the information to New York authorities who placed it under surveillance upon arrival in New York. Although the Court ruled that there would have been time in 15 hours to obtain a warrant, the Court ruled the warrant was unnecessary because the suitcase was initially searched and seized in California. Likewise, one of the bricks was removed and marked and the suitcase marked with the officer's initials. The Court said:

> Even though the suitcase was then in transit, later in the luggage bin and later still in the freight room, it remained legally "seized" just as much as if it were under the actual physical control of the police. In fact, except for the time it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car * * * they were not making an initial

> seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes * * *. Accordingly, no warrant was required.

DeBerry is also similar to Waugh v State, 20 Md. App. 682, 318 A.2d 204 (1974), rev'd on other grounds 275 Md. 22, 338 A.2d 268 (1975), in which the Maryland Court of Special Appeals stated that it would have been impractical for the Arizona police to obtain a search warrant to open suitcases which were about to leave for Maryland. That court also rejected the argument that the police should have requested the airline to hold the luggage or that the police should have relied on the Maryland police to obtain a search warrant.

The same result was reached in Ford when the Court noted that the California officers had seized and marked a package and placed a business card in it, then had

notified Oklahoma City officers who arrested defendant. The Court found that the California officers' dominion over the contraband remained unbroken and that the official seizure of the contraband had taken place in San Francisco.

V

Defendant argues that the Tucson search fails the Fourth Amendment test because it may have been possible for the officers to have seized the suitcases upon identifying the odor or marijuana and then to have arrested defendant prior to the plane's actual departure. Although several reasons for failing to attempt hurried arrest in Tucson under these circumstances are apparent, time constraints on the officers in the baggage room with the plane about to depart, as well as danger to the public inherent in a hastily

contrived arrest in a crowded terminal or on the plane itself are probabilities. The record does not reveal the officer's reasoning for the judgement call, perhaps because neither party considered it to be significant. In my opinion, the officers acted reasonably under the pressure of time and consideration for all concerned. Whether an arrest could have been made, and, if so, without danger to the public, is a matter for conjecture. We are considering an ugly facet of the real world--drug traffic--in which acting upon mere conjecture and in haste can be fatal!

If reasonableness remains the touchstone for lawful search and seizure, the Tucson officers have passed the test.

Defendant also argues that the Arizona seizure and search was defective because of the ruling of the Court in People v Hilber, 403 Mich. 312, 269 N.W.2d 159

(1978), in which the majority acknowledged the separate odors of burned and unburned marijuana and concluded that the odor of burned marijuana alone was no evidence of the immediate presence so as to provide probable cause for a search. The case is inapposite to these facts involving the distinctive odor of unburned marijuana detected by narcotics officers experienced in such detection.

VI

The admission of the evidence seized in this case was not prohibited by Const. 1963, Art. 1 11, which provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provision of this section shall not be construed to bar from evidence in any criminal

> proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

On the facts herein, I find nothing in Const. 1963, Art. 1, 11, which would justify extending the protections of the state Constitution beyond the protections of U.S. Const., Am. IV, so as to require the exclusion of the challenged evidence.

VII

For the reasons stated by the Court of Appeals, there was no reversible error concerning the res gestae witness issue raised by defendant.

In summary, the Tucson narcotics agents had probable cause to believe that defendant's two suitcases contained marijuana. Under the exigencies of defendant's imminent departure of an

airplane leaving the jurisdiction and the short time in which to act, a warrantless search was justified. The well-identified suitcases and contents remained in continuous control of the Tucson police officers and under surveillance of the Kalamazoo officers until the arrest was made. In my opinion, the search, seizure and arrest having been lawful, the subsequent check into one suitcase by the Kalamazoo police violated no constitutional right of defendant.

I would affirm defendant's conviction.

APPENDIX B FOOTNOTES
MAJORITY OPINION

1. U.S. Const., Ams. IV, XIV; Const. 1963, Art. 1, 11.

2. United States v Chadwick, 433 U.S. 1, 97 S.Ct, 2476, 53 L.Ed.2d 538 (1977); People v Crawl, 401 Mich. 1, 257 N.W.2d 86 (1977) (opinion by Levin, J.)

APPENDIX B FOOTNOTES
DISSENTING OPINION

1. M.C.L. 335.341(1)(c); M.S.A. 18.1070(41)(1)(c), now M.C.L. 333.7401(1); M.S.A. 14.15(7401)(1).

2. People v Plantefaber, 408 Mich. 898 (1980).

3. See United States v Van Lewis, 409 F. Supp. 535 (E.D.Mich., 1976), aff'd 556 F.2d 385 (CA 6, 1977), for a general description of a courier profile system's criteria and procedures.

4. See Arkansas v Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); United States v Chadwick, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed2d 538 (1977); United States v United States District Court, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972).

5. See United States District Court, supra; Coolidge v New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Johnson v United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948); People v Beavers, 393 Mich. 554, 566, 227 N.W.2d 511 (1975).

6. See also United States v Ogden, 485 F.2d 536 (CA 9, 1973); Hernandez v United States, 353 F.2d 624 (CA 9, 1965).